and he proposed that the matter should stand over for that purpose. June 28, 1813.

GENERAL WORD THINGS, FOLLOWING PARTICULARS ENUMERATED, CONFINED TO THINGS EJUSDEM GENERIS.

This day the judgment was read, and was in substance and effect conformable to the suggestion of *Lord Redesdale.* July 7th,

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

EARL OF MORTON—*Appellant.*
STUART, ESQ.—*Respondent.*

DECLARATOR of immunity from an alleged right of way as far as respected a person or persons claiming in virtue of a particular tenement, and prayer that (if the right existed) the uses to which the ways were to be applied should be ascertained and defined. Defence, claiming the right by prescription to two ways; one to a harbour, the other to a bay of the sea, in favour of the proprietors of grounds and houses in and about a certain village, in which description the defender was included. Question, Whether on the ground of the sea shore being *publici juris*, or for any other reason assigned, this is sufficiently explicit, or whether it is not necessary in pleading to state the precise and particular uses or purposes for which the right of way is claimed, before the parties can be permitted to go to proof. June 16, 1813.

PLEADING RIGHT OF WAY.

THE Appellant, in 1806, brought an action of declarator of immunity from an alleged servitude, stating, "That his barony of Aberdour was nowise burthened with any servitude or privilege in favour of the lands of *Hillside*; and that the proprietors or inhabitants of these lands had

Action of declarator of immunity by the Appellant.

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no legal right or title to exercise any servitude or privilege whatever upon the lands and barony of Aberdour." The summons (declaration) further stated, that James Stuart of Dunearn, present proprietor of Hillside, nevertheless insisted for and was attempting to establish some sort of right to a privilege or servitude of two roads through the pursuer's property, of which the one was described as the Fishergate, and alleged to lead from the village of Easter Aberdour to Aberdour-harbour; and the other to the bay called Whitesands-bay." And the summons concluded with a prayer to have it found, and declared that the Appellant's property was free from any such privilege or servitude, &c. &c. Which being so found and declared, that the proprietors and inhabitants of the lands of Hillside should be prohibited from claiming, using, or attempting to use these roads, "*or otherwise, that if the defender (Respondent) should duly explain, condescend upon, and instruct any right to the said pretended roads, or either of them, then that the precise course, nature, extent, objects, and purposes of such servitudes or privileges, as well as the particular seasons and manners of exercising the same, which may be found competent to the proprietors or inhabitants of the said lands of Hillside ought and should be exactly ascertained, limited, and defined.*"

The Respondent claims by prescription. Ordered to give in a condescendance *of what he claimed and offered to prove.*

The Respondent stated in defence, that he had acquired a right by prescription to the roads in question. In December, 1806, the action came before Lord Meadowbank, Ordinary, who appointed the Respondent to state in a condescendance *what he claimed, and what he offered to prove.* The

condescendance was accordingly given in; and the Respondent, after describing the course of the roads, "offered to prove by the parole testimony of witnesses, that these roads had been uninterruptedly used; the one leading to the harbour as a road for foot passengers, horses and carriages, and the other to Whitesands-bay, as a road for foot passengers, by all the proprietors of grounds or houses situated on the east side of the rivulet called Aberdour Burn, and lying in the parish of Aberdour, and particularly by the defender and his predecessors (to whom the description applies) for a period beyond the memory of man."

June 16, 1813. PLEADING RIGHT OF WAY. He offers to prove a prescriptive right in the proprietors of houses or grounds on the east-side of Aberdour Burn, including himself and his predecessors.

The Appellant objected to this condescendance as not being sufficiently explicit, and he required a new one, stating, whether the servitude claimed by the Respondent was constituted by grant or prescription, and what were the *purposes* to which the servitude roads were to be applied, and whether the use of both or either of the roads was for his own personal convenience, or for any benefit connected with his lands of Hillside as the dominant tenement, and also what possession the Respondent, his predecessors in the estate of Hillside, and their tenants, have had of the roads in question, *without reference to any possession that may have been had by the other proprietors of grounds or houses, situated in Easter Aberdour.*"

The Appellant insists for a statement of the *purposes* for which the ways were claimed, and of the nature of the Respondent's right as proprietor of Hillside, without reference to the rights of others.

Lord Meadowbank pronounced the following interlocutor: "*Having considered the condescendance for the pursuer, with the answers thereto, and being of opinion that the condescendance implies suf-*

Jan. 13, 1807. Interlocutor of the Lord Ordinary finds the condescendance suf-

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ficiently explicit, and why.

ficiently the nature of the defender's claim to the roads in question, as not to be defended on any existing grant known to the defender; that the defender, in giving in the condescendance ordered, is nowise called on to assign any particular uses for an access to the sea shore, which is juris publici; *that the general use of the road in question, by the feuars of Aberdour, may be very material to ascertain, in leading any proof in support of the defender's claim in behalf of Hillside to the same benefit,*" &c. &c.

The Lord Ordinary having adhered to this interlocutor, the Appellant petitioned the whole Lords that the Respondent might be ordained to lodge a new condescendance stating as above, "and at all events to find that any proof which might be ultimately allowed must be limited upon the defender's (Respondent's) part, *to the possession which might have been enjoyed by himself, and his predecessors, and authors, as proprietors of Hillside, and their tenants, exclusive of any possession alleged to have been had by any neighbouring proprietors, such as the proprietors of grounds and houses in the neighbourhood of Aberdour.*"

Adhered to by the Court.

This petition was refused without answers, and Lord Morton appealed.

Sir S. Romilly, and *Mr. Horner*, (for the Appellant,) argued that the Respondent must prove a title in himself, as proprietor of the lands of Hillside, and that proof of title in all the rest of the world would be nothing as to the purposes of the present

action, unless a public highway were claimed, which was not pretended. Issue was not joined on the issue tendered. The precise objects for which the ways were claimed must be stated; the foot path was said (not in the pleadings) to be for the purposes of sea-bathing; but that ought to be stated, and then it would remain to be considered, whether that was a right of way that could be supported; a right of way must have a precise object, as well by the law of Scotland as by that of England.

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Erskine, B. 2. T. 9.

Mr. Adam, and *Mr. Brougham*, (for the Respondent.) The condescendance was sufficiently explicit, as Mr. Stuart was included in the description of "proprietors of grounds to the east of Aberdour Burn," and the rest was surplusage. It was not necessary here to set forth the particular uses, as the object of the action was to annihilate the servitude; and to this the mere allegation that the Respondent had a right of way was sufficient answer.

Their Lordships would consider how extremely different in point of pleading the laws of the two countries were. The *termini ad quam*, described *ex vi terminorum*, the uses for which the ways were claimed, for when a carriage road was claimed to a harbour, and a foot path to the sea shore, it was to be presumed that they were to be applied to the ordinary uses in such cases. The inhabitants of a town or village might clearly have a servitude of this nature over another person's ground, and they cited to this point the cases of "the inhabitants of Dunbar, and the Duke of Roxburgh, 1713.—Jaf-

Farquhar and Shaw. Kaims, S. D. 1757.

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fray and inhabitants of Kelso against the Duke of Roxburgh, 1755.—Inhabitants of Dysart against Sinclair, 1779.

Sir S. Romilly in reply. The inhabitants in the cases mentioned, claimed under a general custom, which was a different thing, in England certainly, and he believed in Scotland.

Judicial observations.

If a shorter way than the common way to a harbour is claimed, the particular uses must be stated.

Lord Eldon (Chancellor.) If there were no other road to the harbour but this, then to be sure the reasoning in the interlocutor might be well founded. But if it was only a shorter road, it must be shown whether it was limited, or for all uses.

There were two questions to be considered; first, whether the Court of Session was right in not calling upon the Respondent to state the particular uses for which these ways were claimed. Now, without prejudice to the further consideration of the subject, he thought that when the Lord Ordinary called upon the Respondent to state what he claimed, and what he offered to prove, he could not mean less than that he should describe the nature of the servitude, because the evidence might be, that the right of way was for general purposes, or for one purpose, or for a variety of purposes short of a general use. He could not accede to the argument at the bar that a harbour's being the *terminus ad quam* showed the uses for which that road was designed; for as it was not a public road, it might be only for particular purposes. A person might have the right to drive every kind of carriage upon this road, and yet might not have a right to carry every commodity to every place, or to use it for every purpose as the

There may be a right of way for a great variety of different particular purposes, and

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king's subjects might use his highway. There might be a right to carry certain articles for particular tenements, and not for any other purposes. The Lord Ordinary appeared to think that as the sea-shore was *publici juris* wherever there was a way to it, every man had a right to use that way; but this was not universally true, for a right of way to the sea might be granted to one person and not to another. But then it was argued, that it was quite enough to say that they had *a right* to these roads, and that when it came out in proof for what purposes they *had been* used, it would be time enough to state for what purposes they *should* be used. But their Lordships would observe, how that bore upon the second material question. The right was claimed for the proprietors of grounds and houses to the east of Aberdour Burn in the parish of Aberdour, and not merely for this particular Respondent, and the foundation of the claim was prescription. Why then a prescription must be proved in all of them for exactly the same purposes; for otherwise the evidence for A. would not be evidence for B., as A. might have the right for one purpose, B. for another, and C. for a third, and so on. And though a right were proved in all the rest, yet the whole of the evidence might be entirely beside the point, since there might still be no proof that this Respondent had a right to use it for any purpose whatever. If a grant could be produced to all the inhabitants, then to be sure it would be evidence for him, though he had never used the roads; but it was not stated that there was any grant, and he thought, that at any rate the Respon-

the particular purpose or purposes should be stated.

Not true that where there was a way to the sea, every one had a right to it, as it might be granted to one and not to another.

Though a right were proved in all the rest of the proprietors of grounds and houses in and about Aberdour, it might be nothing to the purpose of the present action.

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dent in the present state of the pleadings, was confined to the prescription.

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Monday, June 21, 1813.

Judgment.

Lord Eldon (Chancellor.) After stating the facts of the case as above, he observed, that the action of declarator at the instance of the Appellant might be represented as having two objects; the one, that the Barony of Aberdour should be declared to be free from any servitude in respect of the proprietors of Hillside; the other, that if these proprietors had any right, then that it should be declared what these rights were. The Respondent claimed by prescription, and was therefore bound to make out his case on that ground. The action came before the Lord Ordinary, who ordered the defender to give in a condescendance of *what he claimed and what he offered to prove.* It was insisted at the bar that this had been complied with. The condescendance after describing minutely the course of the roads, went on to state, &c. (*vide ante.*) The Appellant insisted that this was not sufficient, as it did not describe the nature and origin of the servitude; and he required a new condescendance stating the following particulars:—First, Whether the servitude was constituted by grant or prescription, and what length of possession the Respondent undertook to prove in either case?" As to that, the pleadings confined the Respondent to the prescription, and he must be taken to comprehend in that the length of time necessary to constitute a prescriptive right; so that this particular was sufficiently set forth. Then followed the second point; "What were the purposes?" &c. &c.' *(Vide ante.)*

The interlocutor stated, "*That the defender was nowise called upon to assign any particular uses for an access to the sea-shore, which was* publici juris." A proposition which was not true without some qualification; and "*that the general use of the road in question by the feuars of Aberdour might be very material to ascertain,*" &c. Considering the two objects which the action had in view, the interlocutor could not be right in the two particulars above mentioned. The Defender was *first* called upon to state whether he had a right to any road; and, to be sure, it would be an answer to that, to say that he had *a right*, without stating its nature and purposes. But if their Lordships would look at the other object; that, if the Defender had a right, it should be declared for what particular purposes the right existed; then they must perceive that it was necessary to ascertain the nature of the claim, and the purposes to which the roads, or either of them, were to be applied. It might be of importance surely to ascertain whether this was a right of way for all purposes, or for some purposes, more or less limited; and it was fitting, that in the condescendance, these particulars should be distinctly stated. Suppose it were universally true that every one had a right to use a road leading to the sea-shore, yet it might happen that the road must not be used for every purpose.

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Then it had been said, that the purposes would appear in the proof; but the pursuer had a right to know what the other party intended to prove, that he might be prepared to disprove it if he could. Suppose the claim to the foot-path should be for

The allegation that the purposes and uses of the ways would appear when the proof was

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the purpose of bathing, the proof must be according to the nature of the claim; and yet in such a case it might be useless to go into any proof at all, because a right of way for the purpose of bathing might be one which in law could not be supported. In England, if a foot-way were claimed, it would not be sufficient to prove that the claimant had been there on horseback. If a highway had been claimed, that would raise an entirely different question. But when the Defender said that the right even to drive carts and horses along one of the roads belonged to a particular description of persons, he negatived the notion of a highway, and confined the uses in these pleadings to those who came within that particular description. Then it was proper that the Defender should state what species of proof he meant to bring forward, and by what actual exercise of the right or how otherwise, it was to be established; and for what purposes it was intended, as it might be a road to carry articles, not all the world over, but to particular tenements. Unless the particulars were set forth, a variety of loose and improper evidence might be introduced. If the Respondent should state that either of the roads was for the purpose of resorting to the sea-side for the benefit of bathing, then they might afterwards have to consider whether that was a species of right which could be maintained.

taken was no answer; as the other party had a right to know to what point the evidence was to go, that he might be prepared to encounter it if he could.

Another point of great importance to be attended to, was, Whether a right in these feuars of Aberdour could have any bearing upon a right claimed by the Respondent according to the state of these pleadings? He did not say but that in some cases such evidence might be material, but he was of opinion

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that in the present case it was not. As the declarator related merely to the proprietors of the lands of Hillside, proof of usage by other persons was unnecessary or inadmissible. The *user* must be by himself, or his predecessors in the lands of Hillside, or their tenants: that was the only point in these pleadings. He should therefore propose to remit the cause again to the Court of Session, with these findings:—

1st. That the condescendance given in by the Defender (Respondent) did not state the nature of the right of way claimed, inasmuch as it did not set forth to what uses or purposes these roads, or either of them, were to be applied.

2d. That in the state of the pleadings it was not competent with respect to these roads, or either of them, to go into evidence of usage by any person or persons other than the proprietors and tenants of the lands of Hillside.

3d. That the title to one of these roads did not necessarily decide the title to the other.

This last finding seemed to be a truth sufficiently obvious: but, on reading these papers, it would appear not to be unnecessary.

The Judgment of the Court below was accordingly reversed, so far as it was inconsistent with these findings;—affirmed as to the rest, and the cause remitted.